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No. 83-227

In the Supreme Court of the United States

OCTOBER TERM, 1983

LESLIE B. SCHLANSKY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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November 10, 1983

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Leslie B. Schlansky v. United States, No. 83-227

Dear Mr. Stevas:

On page two of the memorandum we filed in reponse to the petition for a writ of certiorari in the above case, we stated that petitioner first raised a Fifth Amendment claim when he appeared before the IRS special agent after the district court adopted the magistrate's recommendation and ordered the summons enforced. Counsel for petitioner has brought to our attention that the Fifth Amendment privilege was discussed during the prior proceedings before the magistrate. The magistrate, however, apparently did not understand that the Fifth Amendment privilege was being asserted because he did not rule on that issue. We bring this to the Court's attention for the sake of accuracy, although it is immaterial to the disposition suggested in our response.

Sincerely yours,

Rex E. Lee
Solicitor General

cc: David R. Irvin, Esq.
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TABLE OF AUTHORITIES

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Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring him to produce a ring binder containing his records and an accountant's workpapers used in the preparation of petitioner's 1976 and 1977 federal income tax returns. Holding that petitioner's privilege against compelled self-incrimination did not preclude production of the records, the courts below directed respondent to comply with the summons.

1. Petitioner employed a certified public accounting firm to prepare his federal income tax returns for the years 1976 and 1977. He provided that firm with his cancelled checks, bank statements, and other records, and the firm prepared, in workpaper form, journals and a ledger for petitioner's business activities, as well as petitioner's federal income tax returns. The workpapers prepared by the firm, together with petitioner's records, were placed in a ring binder for

retention by the firm (Pet. App. 3a-4a). After the Internal Revenue Service commenced its investigation of petitioner's 1976 and 1977 tax returns, petitioner acquired the ring binder, and the special agent in charge of the investigation summoned it from petitioner. Upon petitioner's refusal to produce the ring binder, this action was commenced to compel its production.

Petitioner resisted enforcement of the summons on the ground that the summons had been issued solely for the purpose of assisting a criminal investigation. The district court followed the disposition recommended by the magistrate to whom the case had been referred and entered an order directing petitioner to obey the summons (Pet. App. 35a-46a). No appeal was taken from that order. Petitioner appeared before the agent and, for the first time, asserted that the records sought were protected by his privilege against compelled self-incrimination. In the proceeding subsequently brought to enforce the court's order, employees of the accounting firm described the ring binder and its contents (*id.* at 27a-30a), and petitioner submitted the ring binder for in camera inspection by the court. That inspection disclosed that the ring binder contained several categories of documents: (1) accountant's workpapers, (2) summaries of petitioner's bank account activity, (3) bank statements of interest earned by petitioner's accounts, (4) cancelled checks written by petitioner's wife and copies of church contribution records, (5) copies of corporate tax returns for corporations in which petitioner held an interest, (6) petitioner's cancelled checks, and (7) deposit slips prepared by petitioner (*id.* at 19a). The district court (*id.* at 16a-17a) adopted the magistrate's conclusion that under *Fisher* v. *United States*, 425 U.S. 391 (1976), the contents of the ring binder were not protected by petitioner's privilege against self-incrimination. The magistrate determined that petitioner had no privilege with respect to the first five

items listed above, since they had not been prepared by him and were not his private papers (Pet. App. 19a). The magistrate also found that the act of producing the remaining documents did not constitute testimonial self-incrimination (*id.* at 19a-24a).

2. The court of appeals affirmed (Pet. App. 1a-11a). Noting that under *Fisher* the Fifth Amendment privilege applies only when the party claiming its protection is compelled to make a testimonial communication that is incriminating, the court concluded that there "would be no testimonial ingredient in the act of producing the binder or any of its contents" (Pet. App. at 9a). The court found that there was no serious question as to existence and location of the papers at issue and that the government was not attempting to use the act of production to authenticate them (*id.* at 9a-10a). The court recognized that there is a conflict among the circuits concerning whether the Fifth Amendment privilege protects the contents of "private papers." But the court found it unnecessary to reach that issue, because the records summoned here were financial records and petitioner conceded at oral argument that they are not private papers (*id.* at 10a-11a).

3. This case presents several questions closely related to those before this Court in *United States* v. *Doe*, cert. granted, No. 82-786 (May 2, 1983),[1] including whether the contents of an individual's preexisting business records are protected by the Fifth Amendment privilege and whether the act of producing such records amounts to testimonial self-incrimination where there is no serious question as to the existence or location of the documents and the government is not attempting to use the fact of production as

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[1]We are serving petitioner with a copy of our brief in *Doe*.

authentication of the documents.[2] In these circumstances it would be appropriate to hold this petition pending the Court's decision in *Doe*.

It is therefore respectfully submitted that the petition should be held for disposition in light of the decision in *United States* v. *Doe*, No. 82-786.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[2]While the issues presented by the two cases are similar, the cases differ in many particulars, including the following: the types of documents sought (compare Pet. App. 19a with *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 328 n.2 (3d Cir. 1982), cert. granted *sub nom. United States* v. *Doe*, No. 82-786 (May 2, 1983)); ownership of certain documents (compare Pet. App. 19a, 31a with 680 F.2d at 334); authorship of certain documents (compare Pet. App. 19a-20a with 680 F.2d at 335); evidence concerning the existence and possession of the documents (compare Pet. App. 9a with the government's brief in *Doe* (at 31-32)); the available means of authenticating the documents without the participation of the individual upon whom the subpoena or summons was served (compare Pet. App. 9a with the government's brief in *Doe* (at 33-38)); and the procedure employed to ensure that any testimonial self-incrimination inherent in the act of production would not be used against the individual (compare Pet. App. 9a-10a with 680 F.2d at 337 and the government's brief in *Doe* (at 43-49)).

DOJ-1983-09